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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 VERNON L. HAFFNER,

12 Petitioner,

13 v.

14 PAT GLEBE,

15 Respondent.

Case No. C09-5364FDB-KLS

REPORT AND
RECOMMENDATION

Noted for December 4, 2009

16 Petitioner is a state prisoner currently incarcerated at the Stafford Creek Corrections Center,
17 located in Aberdeen, Washington. This matter is before the Court on petitioner's petition for writ of
18 *habeas corpus* filed with this Court pursuant to 28 U.S.C. § 2254. After a careful review of the record,
19 the undersigned submits the following report and recommendation, recommending the Court deny the
20 petition as unexhausted.

21 DISCUSSION

22 On June 17, 2009, petitioner filed an application to proceed *in forma pauperis* and a petition for
23 writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. (Dkt. #1). Exhaustion of state court remedies is a
24 prerequisite to the granting of a petition for writ of *habeas corpus*. 28 U.S.C. § 2254(b)(1). If exhaustion
25 is to be waived, it must be waived explicitly by respondent. 28 U.S.C. § 2254(b)(3). Thus, a waiver of
26 exhaustion may not be implied or inferred. A petition can satisfy the exhaustion requirement by
27 providing the highest state court with a full and fair opportunity to consider all claims before presenting
28 them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083,

1 1086 (9th Cir. 1985). Full and fair presentation of claims to the state court requires “full factual
2 development” of the claims in that forum. Kenney v. Tamayo-Reyes, 504 U.S. 1, 8 (1992).

3 It is not enough that all of the facts necessary to support the federal claim were before the state
4 courts, or that a somewhat similar state law claim was made. Duncan v. Henry, 513 U.S. 364, 366 (1995)
5 (citing Picard v. Connor, 404 U.S. 270 (1971) and Anderson v. Harless, 459 U.S. 4 (1982)). A federal
6 claim is “fairly and fully” presented to the state courts if the claim is presented “(1) to the proper forum,
7 (2) through the proper vehicle, and (3) by providing the proper factual and legal basis for the claim.”
8 Insyxiengmay v. Morgan, 403 F.3d 657, 668 (9th Cir. 2005) (internal citations omitted). The petitioner
9 “must alert the state courts to the fact that he is asserting a federal claim in order to fairly and fully
10 present the legal basis of the claim.” Id.

11 The claim must be fairly presented in “each appropriate state court,” that is, at each level of state
12 review, so as to alert the state “to the federal nature of the claim,” and to give it the “opportunity to pass
13 upon and correct” alleged violations of the petitioner’s federal rights. Baldwin v. Reese, 541 U.S. 27, 29
14 (2004) (citations and internal quotation marks omitted); see also Ortberg v. Moody, 961 F.2d 135, 138
15 (9th Cir. 1992). The federal basis of the claim, furthermore, must be made “explicit” in the state appeal
16 or petition, “either by specifying particular provisions of the federal Constitution or statutes, or by citing
17 to federal case law.” Insyxiengmay, 403 F.3d at 668; Baldwin, 541 U.S. at 33.

18 In his petition, petitioner raises the following grounds for federal *habeas corpus* relief:

19 GROUND ONE: Ineffective Assistance of Counsel . . . Counsel Did not use witness
20 during trial that gave confession to him which was recorded and a [sic] statement given
21 by Shawn Wills.

22 GROUND TWO: Violation of Due Process – No Signed Confession or Waiver of
23 Miranda Rights . . . During Interrogation I requested an Attorney to be present several
24 times Interrogation Officer Sample [and] Conroy ignored my request and continued to
25 interrogate me and collaborated in a “false” confession. Not once was I told to sign
26 anything or to waive my rights.

27 GROUND THREE: Challenge of Credibility of Witness . . . Mr. Jones’s testimony was
28 not consistent with police report, pg. 289 and could not Identify Perp. Det. Samples
[and] Conroy used their memories to rely on statements that were neither recorded or
written down.

1 (Dkt. #5, pp. 6, 8-9).¹ Respondent argues petitioner failed to fairly and fully present the above grounds
2 for federal *habeas corpus* relief to the state's courts. The undersigned agrees.

3 On June 13, 2006, petitioner was convicted by jury verdict of first degree burglary and first degree
4 attempted robbery in the Clark County Superior Court. (Dkt. #11, Submission of Relevant State Court
5 Record, Exhibit 1). On direct appeal to the Washington State Court of Appeals, Division II, petitioner's
6 appellate counsel raised the following claims:

- 7 1. THE DUE PROCESS CLAUSE OF THE WASHINGTON CONSTITUTION
8 REQUIRES ELECTRONIC RECORDING OF CUSTODIAL
INTERROGATIONS.
- 9 2. FAILING TO FIND THAT ELECTRONIC RECORDING OF CUSTODIAL
10 INTERROGATIONS IS REQUIRED AS A MATTER OF DUE PROCESS,
THIS COURT SHOULD NONETHELESS EXERCISE ITS SUPERVISORY
11 AUTHORITY TO FASHION AN EXLUSIONARY REMEDY.
- 12 3. THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING A SENTENCE
BEYOND THE STATUTORY MAXIMUM TERM.

13 (Id., Exhibit 2, pp. i-ii, 1, 10-29). None of the above three claims, however, present the same issues as the
14 grounds petitioner raises in his petition for federal *habeas corpus* relief. The same is true with respect to
15 the claim petitioner presented in his Statement of Additional Grounds for Relief he filed *pro se* with the
16 state court of appeals: "Was the defendants [sic] trial attorney ineffective by not moving for certain jury
17 instructions or chalenging [sic], the prosecutions line up identification, when the witness was not able to
18 positively identify the defendant." (Id., Exhibit 3, p. 2).

19 In the petition for review petitioner's appellate counsel filed with the Washington State Supreme
20 Court, the following claims also were presented:

- 21 1. WHETHER DUE PROCESS REQUIRES THE ELECTRONIC RECORDING
22 OF CUSTODIAL INTERROGATIONS IS A SIGNIFICANT QUESTION OF
CONSTITUTIONAL LAW.
- 23 2. WHETHER AN EXCLUSIONARY REMEDY IS NEEDED IS AN ISSUE OF
24 SUBSTANTIAL PUBLIC INTEREST WHICH SHOULD BE REVIEWED BY
THIS COURT.

25 (Id., Exhibit 6, pp. i-ii, 5-20). These claims are substantially the same as those presented on direct appeal
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27 ¹These page numbers are the page numbers that appear on the pages of the federal *habeas corpus* petition form petitioner
28 used containing these grounds for relief. However, because the petition form begins on page 2, those pages are actually the fifth,
seventh and eighth pages of the petition. For the sake of clarity and consistency, though, the undersigned shall use the page numbers
that appear on the form itself.

1 to the Washington State Court of Appeals. In addition, no federal claims were raised here.

2 Petitioner did file a *pro se* personal restraint petition with the Washington State Court of Appeals,
3 Division II, in which he argued his appellate counsel “was ineffective for neglecting and failing to raise
4 an issue with merit,” which prejudiced him on direct appeal. (Id., Exhibit 8, p. 1). However, as pointed
5 out by respondent, the only ineffective assistance of counsel claim petitioner has raised in his federal
6 *habeas corpus* petition, concerns his trial counsel. Accordingly, the undersigned finds none of the claims
7 raised in that petition have been fairly and fully exhausted in the state courts. Petitioner’s petition thus is
8 barred, unless he can establish those claims are not now procedurally defaulted.

9 “The procedural default doctrine ‘bar[s] federal habeas [corpus review] when a state court [has]
10 declined to address a prisoner’s federal claims because the prisoner . . . failed to meet a state procedural
11 requirement.’” Boyd v. Thompson, 147 F.3d 1124, 1126 (9th Cir. 1998) (quoting Calderon v. United
12 States District Court, 96 F.3d 1126, 1129 (9th Cir.1996) (quoting Coleman v. Thompson, 501 U.S. 722,
13 729-30 (1991))). Thus, for example, a district court may not consider the merits of a *habeas corpus*
14 petition if the petitioner failed to exhaust state court remedies, and the state’s highest court now would
15 find the federal claims contained therein to be procedurally barred. Coleman, 501 U.S. at 735 n.1; see also
16 Eisermann v. Penarosa, 33 F.Supp.2d 1269, 1274 (D. Haw. 1999) (“[I]f a petitioner has never raised his
17 federal claim to the highest state court available and is now barred from doing so by a state procedural
18 rule, exhaustion is satisfied because no state remedy remains available, but the petitioner has procedurally
19 defaulted on his claim.”).

20 To give litigants “a fair opportunity to comply with known procedural rules, the controlling state
21 procedural bar is the one in place at the time the claim should have been raised.” Calderon v. U.S. District
22 Court for the Eastern District of California, 103 F.3d 72, 75 (9th Cir. 1996). Thus, “[o]nly if the bar is
23 ‘firmly established and regularly followed’ at that time will it serve as an adequate ground to foreclose
24 federal review.” Id. Since 1989, Washington has had a one-year period of limitation within which a
25 conviction or sentence may be collaterally attacked:

26 No petition or motion for collateral attack on a judgment and sentence in a criminal
27 case may be filed more than one year after the judgment becomes final if the judgment
and sentence is valid on its face and was rendered by a court of competent jurisdiction.

28 RCW 10.73.090(1). Although Washington state law also provides six statutory exceptions to the above

1 time limit, none of those exceptions apply in this case. See RCW 10.73.100.

2 In Washington, “a judgment becomes final on the last of the following dates: (a) The date it is
3 filed with the clerk of the trial court; (b) The date that an appellate court issues its mandate disposing of a
4 timely direct appeal from the conviction; or (c) The date that the United States Supreme Court denies a
5 timely petition for certiorari to review a decision affirming the conviction on appeal.” RCW 10.73.090(3).
6 The term “mandate” is defined as “the written notification by the clerk of the appellate court to the trial
7 court and to the parties of an appellate court decision terminating review.” Washington Rule of Appellate
8 Procedure (“RAP”) 12.5(a). As noted above, the Washington State Supreme Court denied the petition for
9 review of the denial of petitioner’s direct appeal on April 30, 2008. There is no indication that petitioner
10 sought review by the United States Supreme Court.

11 That leaves either the date petitioner’s judgment was filed with the clerk of the trial court, or the
12 date the Washington State Court of Appeals issued its mandate. Clearly, the latter date would apply here,
13 as petitioner appealed his conviction and sentence. While the record before the Court does not contain a
14 copy of the mandate in this case, Washington law requires that “[i]f a petition for review has been timely
15 filed and denied by the [Washington State] Supreme Court, the clerk of the Washington State Court of
16 Appeals shall issue the mandate “upon denial of the petition for review.” RAP 12.5(b)(3). As such, the
17 date the Washington State Court of Appeals issued its mandate – and thus the date petitioner’s judgment
18 became final – is deemed to be April 30, 2008. More than one year has passed since petitioner’s
19 judgment became final, therefore, resulting the procedural default of his federal claims.

20 Only if petitioner “can demonstrate cause for the [procedural] default and actual prejudice as a
21 result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result
22 in a fundamental miscarriage of justice,” will he be entitled to *habeas corpus* review of those claims. See
23 Boyd v. Thompson, 147 F.3d 1124, 1126 (9th Cir. 1998) (citing Coleman, 501 U.S. at 750). To satisfy
24 the “cause” prong, petitioner must show “some objective factor external to the defense” prevented him
25 from complying with the state’s procedural rule. McCleskey v. Zant, 499 U.S. 467, 493 (1991) (quoting
26 Murray v. Carrier, 477 U.S. 478, 488 (1986)). Objective factors constituting “cause” include
27 “interference by officials” making compliance with the rule impracticable, as well as “a showing that the
28 factual or legal basis” for the claims “was not reasonably available.” Id. at 493-94 (internal quotes

1 omitted). In addition, constitutionally ineffective assistance of counsel also constitutes cause, but any
2 attorney error short of that will not excuse procedural default. Id. at 494.

3 The mere fact that a petitioner is *pro se* or lacks knowledge of the law, furthermore, is insufficient
4 to satisfy the cause prong. That is, “[w]hen a pro se petitioner is able to apply for post-conviction relief to
5 a state court, the petitioner must be held accountable for failure to timely pursue his remedy to the state
6 supreme court.” Hughes v. Idaho State Board Of Corrections, 800 F.2d 905, 909 (9th Cir. 1986) (finding
7 petitioner’s claims of illiteracy and lack of help in appealing post-conviction petition, though unfortunate,
8 to be insufficient to meet cause standard); Boyd, 147 F.3d at 1126-27.

9 Once a petitioner establishes cause, he must show “‘actual prejudice’ resulting from the errors of
10 which he complains.” Allen v. Ornoski, 435 F.3d 946, 956 (9th Cir. 2006) (quoting McCleskey, 499 U.S.
11 at 494 (quoting United States v. Frady, 456 U.S. 152, 168 (1982))). Such prejudice exists if the alleged
12 errors worked to the petitioner’s “*actual* and substantial disadvantage, infecting his entire trial with error
13 of constitutional dimensions.” Frady, 456 U.S. at 170 (emphasis in original). In the alternative, a *habeas*
14 *corpus* petition may be granted without a showing of cause in those “extraordinary instances when a
15 constitutional violation probably has caused the conviction of one innocent of the crime.” McCleskey,
16 499 U.S. at 494; Murray, 477 U.S. at 495-96 (in extraordinary case, where constitutional violation has
17 probably resulted in conviction of one who is actually innocent, federal *habeas* court may grant petition
18 even in absence of showing of cause).

19 Here, petitioner makes no showing that some objective factor external to his defense prevented
20 him from complying with Washington’s procedural bar rule. Because petitioner “cannot establish any
21 reason, external to him, to excuse his procedural default,” this court need not address the issue of actual
22 prejudice. Boyd, 147 F.3d at 1127; Thomas v. Lewis, 945 F.2d 1119, 1123 n.10 (9th Cir. 1991) (finding
23 of lack of cause eliminates court’s need to discuss whether petitioner was prejudiced). Further, as
24 petitioner is not alleging he is actually innocent, this is not the kind of extraordinary instance where the
25 petition should be granted despite the absence of a showing of cause. McCleskey, 499 U.S. at 494;
26 Murray, 477 U.S. at 495-96.

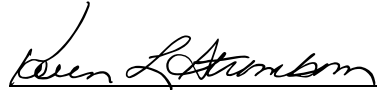
27 CONCLUSION

28 Because it appears that petitioner has failed to exhaust all of his state court remedies, the Court

1 should deny the petition.

2 Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rules of Civil Procedure (“Fed. R. Civ. P.”) 72(b),
3 the parties shall have ten (10) days from service of this Report and Recommendation to file written
4 objections thereto. See also Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those
5 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit
6 imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set this matter for consideration on **December 4,**
7 **2009**, as noted in the caption.

8 DATED this 12th day of November, 2009.

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12 Karen L. Strombom
13 United States Magistrate Judge
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